No. 88-833

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In the Supreme Court of the United States

OCTOBER TERM, 1988

DOMINIC MARIANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government made improper use of petitioner's immunized grand jury testimony.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 851 F.2d 595. The opinion of the district court (Pet. App. 17a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1988. A petition for rehearing was denied on September 20, 1988. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on November 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to participate in the affairs of an

enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to commit extortion, in violation of 18 U.S.C. 1951; making illegal payments to a union representative, in violation of 29 U.S.C. 186(a)(2); making illegal payments to influence the operation of an employee benefit plan, in violation of 18 U.S.C. 1954; perjury, in violation of 18 U.S.C. 1623(a); and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to concurrent four-year terms of imprisonment on the racketeering, extortion, and illegal payment counts, to be served consecutively to concurrent one-year sentences on the perjury and obstruction of justice counts. After a post-trial evidentiary hearing to determine whether the government had improperly used testimony that petitioner gave to a grand jury under a grant of immunity pursuant to 18 U.S.C. 6002, the district court vacated petitioner's convictions on the racketeering, extortion, and illegal payment counts (Pet. App. 17a-30a). The court of appeals reversed and reinstated the convictions (*id.* at 1a-14a).

1. In 1982, Anthony Giliberti, a witness for the prosecution at petitioner's trial, told federal prosecutors about a longstanding criminal enterprise involving the commercial moving business in New York City. Giliberti had worked for Teamsters Local 814, a corrupt local union. He said that petitioner, who owned or operated two moving companies, had made payoffs to Jimmy Rotondo, a member of a New York organized crime family that was involved with Local 814. As a consequence, petitioner was permitted to use nonunion labor and to remain delinquent in his payments to the union pension and welfare funds. Pet. App. 6a-7a.

Petitioner was called before a grand jury in 1983. He testified that he had been in the moving business in New York City since 1952 and that Local 814 had represented

his companies' employees. Asserting his privilege against compulsory self-incrimination, petitioner refused to say whether he knew Rotondo or whether he had made payoffs to Rotondo or representatives of Local 814. Pet. App. 5a.

In August 1984, petitioner testified before the same grand jury pursuant to a grant of immunity under 18 U.S.C. 6002.[1] He admitted that his companies had used nonunion labor and had been delinquent in making payments to Local 814's pension and welfare funds, but had not been subjected to a strike that affected other moving companies. He also testified that he knew Giliberti and Rotondo. He denied making payoffs to either of them or to anyone else associated with Local 814, however. Pet. App. 5a-6a.

In December 1984, Warren Wagner, who was also a witness for the prosecution at petitioner's trial, supplied additional information to federal prosecutors concerning corruption in the New York moving business. Wagner, the chief executive of one of petitioner's competitors, stated that throughout the 1970s his company, petitioner's company, and two other moving companies engaged in various bid-rigging schemes and that they had all made payoffs to Local 814 at various times. Petitioner was subsequently indicted along with a number of other movers, officials of Local 814, and organized crime figures. Pet. App. 7a-8a.

Petitioner was charged and convicted following a six-month trial on the racketeering and extortion counts and

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[1] Section 6002 provides "use" immunity rather than broader "transactional" immunity. The statute states that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

the counts alleging that he made corrupt payoffs to union officials. Those are the counts he now challenges. He was also charged and convicted of perjury and obstruction of justice in connection with his immunized grand jury testimony. Those counts are not at issue here. Pet. App. 17a, 20a.

2. Following the trial, the district court held a hearing to determine whether the government had made improper use of petitioner's immunized testimony. The district court concluded that the government had not made any evidentiary use of the immunized testimony. The district court also concluded that petitioner would have been indicted in the absence of his immunized testimony. Pet. App. 26a. Nevertheless, the district court vacated all of petitioner's convictions except those for perjury and obstruction of justice.

Relying on *Kastigar* v. *United States,* 406 U.S. 441 (1972), where this Court upheld the constitutionality of Section 6002, the district court first noted that the statute was "designed to leave the witness who is compelled to testify in substantially the same position as if the witness had not testified." Pet. App. 22a. The court then concluded that the government had used the immunized testimony in three ways. First, petitioner's admission that he knew Rotondo ensured that petitioner "could not deny at trial a key part of the government's evidence without risking another perjury prosecution." *Id.* at 24a. Second, petitioner's testimony improperly "corroborated" Giliberti's and Wagner's testimony, the district court concluded, even though it was not used at trial and even though petitioner would have been indicted if he had not given the immunized testimony. *Id.* at 24a-26a. Third, the prosecutors (correctly) concluded, based in part on petitioner's immunized performance before the grand jury, that he was such

a bad witness that he would not be called as a witness in his own defense. *Id.* at 20a-21a.

3. The court of appeals reversed and remanded for reinstatement of the jury's verdict. It noted that "[t]he evidence given by Giliberti * * * and Wagner was quite sufficient to indict [petitioner] and convict him of racketeering conspiracy" (Pet. App. 9a) and that "the evidence used at [petitioner's] trial was derived from sources entirely independent of any immunized testimony given by [petitioner]" (*id.* at 12a). In these circumstances, the court concluded, "we cannot see how the government prosecutors' knowledge of [petitioner's] immunized testimony could be considered impermissible use of that testimony." *Ibid.*

With respect to the district court's conclusion that the government had improperly used petitioner's testimony that he knew Rotondo, the court of appeals stated that the "short answer is that the government simply did not use" that statement at trial, but relied on Giliberti and Wagner to tie petitioner to Rotondo. Pet. App. 12a. Similarly, the court of appeals concluded that petitioner's admissions about corruption in the New York City moving business "were in no sense used to corroborate Giliberti and Wagner." *Id.* at 13a. Finally, with respect to the district court's conclusion that the prosecution had improperly used petitioner's immunized testimony because the prosecutors had decided that based on petitioner's performance they did not need to prepare to cross-examine him, the court stated that it could "not see how the prosecutor's judgment that [petitioner] would not take the stand can be considered a use of the immunized testimony." *Ibid.* The court added: "Were these supposed non-evidentiary uses of [petitioner's] immunized testimony found to be so impermissible that they barred prosecution thereafter for the matters covered by the witness, it would be impossible ever

to prosecute a witness for such matters, once the witness had given immunized testimony." *Ibid.*

ARGUMENT

1. As we observed in our memorandum in opposition filed in December 1988, this case is at present in an interlocutory posture. After the district court reinstates the jury verdict, the court of appeals will review the case for trial error if petitioner appeals. For this reason, the case does not warrant review by this Court at this time.

2. In any event, the court of appeals did not err. It is undisputed that the prosecution did not make any evidentiary use of petitioner's immunized testimony, and it is also undisputed that petitioner would have been indicted and convicted whether or not he had given his immunized testimony. Pet. App. 9a, 26a. In these circumstances, petitioner's convictions should not be reversed.

That is especially so since the "uses" that the district court concluded the government made of petitioner's immunized testimony are so insubstantial. No use at all was made of petitioner's admission that he knew Rotondo and his statements describing the corrupt operation of the moving business in New York City, except perhaps to further confirm the merits of the case in the prosecutors' minds. But where, as here, the defendant would have been indicted anyway, that "use" is immaterial, as it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar* v. *United States,* 406 U.S. at 462. Similarly, as the court of appeals stated, the prosecutors' decision not to prepare to cross-examine petitioner "could not have strengthened the government's case." Pet. App. 13a.

Petitioner suggests (Pet. 19) that, under the decision below, "the government could routinely enjoy a prospective criminal defendant's deposition before indictment." But there is no basis for any suggestion that the prosecutors acted other than in good faith in immunizing petitioner.[2] Moreover, as the court of appeals concluded, petitioner's "convictions are the result of his choosing to deny, under oath, any knowledge or any part in the conspiracy. Instead of * * * telling the truth when sworn before the grand jury, he elected to deceive and obstruct. He thus ran the risk that others would tell the story and implicate him." Pet. App. 13a.

3. Nor is there any merit to petitioner's suggestion that review is warranted to resolve a conflict in the courts of appeals. Two of the four cases on which petitioner relies, *United States* v. *Crowson,* 828 F.2d 1427 (9th Cir. 1987), cert. denied, 109 S.Ct. 87 (1988), and *United States* v. *Byrd,* 765 F.2d 1524 (11th Cir. 1985), offer him no support at all, as the courts of appeals affirmed criminal convictions in those cases. The court in *Crowson* stated, consistent with the decision below: "[I]f the government can prove a prior, independent source for its evidence, then the non-evidentiary purposes of trial strategy, etc., would seemingly have been developed anyway. Thus, any non-evidentiary use of the immunized testimony would have been inevitable and harmless in any regard." 828 F.2d at

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[2] Petitioner suggests (Pet. 23 n.7) that the government should have replaced the attorneys who elicited petitioner's immunized grand jury testimony with other attorneys at his trial. While that course of action would have avoided any question as to the possible improper use of petitioner's immunized testimony, it would have seriously disrupted the investigation in this case. Whatever the wisdom of using new prosecutors where it is practical to do so, there is no rule that an attorney who is exposed to some immunized testimony is forbidden from prosecuting at trial, as the district court noted (Pet. App. 29a n.1).

1432. Similarly, the court in *Byrd* held that "[s]o long as none of the evidence presented to the grand jury is derived, directly or indirectly, from the immunized testimony, it can fairly be said that the defendant's immunized testimony has not been used to incriminate him. * * * If and when the government seeks to elicit or introduce evidence indirectly derived from Byrd's testimony * * *, the government would have the burden of showing by a preponderance of the evidence * * * that the evidence adduced was derived from independent sources." 765 F.2d at 1530-1531. Nor does *United States* v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983), conflict with the decision here. The court of appeals there merely concluded that it did not know what use the government had made of immunized testimony, and therefore remanded "to the district court so that it may conduct an evidentiary hearing." *Id.* at 895.

Finally, review is not warranted on account of any tension between the decision below and the decision in *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973). In that case, which did not involve a grant of use immunity under Section 6002, the prosecutor read transcripts of the defendant's immunized testimony before a state court grand jury while unaware that under the applicable state law the defendant had transactional immunity with respect to that testimony. As the court of appeals here recognized (Pet. App. 11a), the court in *McDaniel* did not hold that any nonevidentiary use of immunized testimony, no matter how insubstantial, is proscribed. Rather, the court in *McDaniel* reasoned that, because the prosecutor in that case was unaware that the defendant's prior testimony was immunized, he had no reason to segregate his testimony from his other sources of information, and could not carry his burden of showing that the testimony had not been

used improperly.[3] The court below added that, "[t]o the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning." *Ibid.* Since *McDaniel* need not be read to require such a result (and thereby virtually convert "use" immunity into "transactional" immunity), there is no reason for this Court to review the correct decision of the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] In addition, the defendant's attorney in *McDaniel* urged him to "fully divulge all his illegal actions" to the grand jury because the state statute gave him transactional immunity, and the defendant "gave self-incriminating testimony filling three volumes of transcript." 482 F.2d at 307. Here, in contrast, petitioner did not fully divulge his knowledge of the corruption in the New York City moving business, but instead lied to the grand jury.

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